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NO. 94-1148

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROBERT A. HUPPELER,
EDWIN C. MAGLI, and
ELLWOOD SANDMIRE,
Petitioners,

v.

OSCAR MAYER FOODS CORPORATION,
Plan Administrator, and
PENSION PLAN NO. 1,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a case involving a pension plan's offset of a worker's compensation award for permanent partial hearing loss under the Employment Income Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, warrants reexamination of this Court's earlier unanimous holding in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

II. Whether ERISA preempts any reliance on state law to determine the character of worker's compensation benefits that are offset by a pension plan subject to ERISA.

III. Whether the Seventh Circuit's judgment in favor of a pension plan's offset of a worker's compensation award for permanent partial hearing loss is correct under any state or federal law theory.

RULE 29.1 LISTING

The ultimate parent of Oscar Mayer Foods, Corp. is Philip Morris Companies, Inc.

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TO THE HONORABLE SUPREME COURT:

Respondents, OSCAR MAYER FOODS CORP., in its Capacity as Administrator of Pension Plan No. 1, and PENSION PLAN NO. 1 (For Active Hourly Employees of Oscar Mayer Foods Corp. and Subsidiary Companies) (collectively referred to as "Oscar Mayer"), respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, ROBERT A. HUPPELER, EDWIN C. MAGLI, and ELLWOOD SANDMIRE.

OPINIONS BELOW

In a published opinion, the Seventh Circuit Court of Appeals affirmed the decision of the District Court for the Western District of Wisconsin granting summary judgment in favor of Oscar Mayer. Huppeler v. Oscar Mayer Foods Corp., 32 F.3d 245 (7th Cir. 1994). The Seventh Circuit's decision is reproduced in the Petitioners' Appendix to Huppeler's Petition for Writ of Certiorari ("Pet. App."). The District Court's opinion has not been published but is reported at 1993 WL 730699 (W.D. Wis.) and is partially reproduced in the Petitioners' Appendix.[1]

JURISDICTION

Petitioners state they are seeking certiorari pursuant to 28 U.S.C. § 2101(c). Section 2101(c) addresses the time period within which a petition for certiorari must be filed. It is not jurisdictional. However, this Court's jurisdiction may be invoked under 28 U.S.C. § 1254(1).

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[1] Unfortunately, Petitioners' Appendix, apparently inadvertently, omits selected portions of the District Court's opinion without indicating it has done so. A corrected text incorporating the missing language is included as part of the Respondents' Appendix ("Resp. App.") with the language missing from Petitioners' Appendix underlined.

STATUTORY PROVISIONS INVOLVED

This case involves the nonforfeiture provisions in Section 203(a) of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1053(a), and the preemption provisions in Section 514 of ERISA, 29 U.S.C. § 1144(a). The ERISA provisions are set forth in Oscar Mayer's Appendix ("Resp. App."). Other regulatory provisions are set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Oscar Mayer, a Delaware corporation headquartered in Wisconsin, employed Huppeler, Magli and Sandmire in various capacities in its plant at Madison, Wisconsin. While employed, all three individuals were represented by Local 538 of the United Food and Commercial Worker's International Union (the "Union"). As members of the Union, all three individuals were covered by Pension Plan No. 1, a defined benefit pension plan sponsored and administered by Oscar Mayer and negotiated between Oscar Mayer and the Union. The Pension Plan provides for normal retirement, early retirement, and disability retirement benefits.

Pursuant to the terms of a 1985 negotiated agreement between the Union and Oscar Mayer, a retiree's benefits paid from the Pension Plan are offset, on a dollar-for-dollar basis, by all worker's compensation paid to such retiree, with the exception of payments made "for the loss of a body member." As participants in the Pension Plan, Huppeler, Sandmire and Magli were provided with summary plan descriptions that described the operation of the worker's compensation offset.

Huppeler retired from Oscar Mayer and commenced receiving early retirement benefits on or about January 28, 1992. In February 1993, the Wisconsin Department of Industry, Labor and Human Relations affirmed an award to Huppeler of 45.58 weeks of worker's compensation payments at a rate of $144 per week. The award, which resulted from a previously adjudicated 21.1% bilateral hearing loss, was computed based on Huppeler's wage rate while at Oscar Mayer. On May 14, 1993, Oscar Mayer notified Huppeler that his retirement

benefits under the Pension Plan would be offset against the worker's compensation benefits he had received on a dollar-for-dollar basis.

Sandmire and Magli have also retired from Oscar Mayer and are presently receiving retirement benefits from the Pension Plan. Both Sandmire and Magli believe they have suffered permanent work-related hearing losses; however, both say that they have refrained from filing worker's compensation claims because of their understanding that the pension benefits currently being paid to them under the Pension Plan would be offset by any worker's compensation benefits they may receive.

On June 2, 1993, Huppeler, Sandmire and Magli (collectively referred to as "Huppeler"), filed an action against Oscar Mayer alleging that the offset of worker's compensation awards for permanent hearing impairment resulted in an impermissible forfeiture of benefits in violation of Section 203(a) of ERISA, 29 U.S.C. § 1053(a). Relying on the Ninth Circuit's decision in Losada v. Golden Gate Disposal Co., 950 F.2d 1395 (9th Cir. 1991),[2] Huppeler asserted that his worker's compensation award could not be offset, because under Wisconsin law the payments for partial hearing loss were made for bodily impairment and not wage replacement.

Oscar Mayer argued that its offset was permitted under this Court's unanimous decision in Alessi, 451 U.S. 504. Oscar Mayer also maintained that, in accordance with Alessi and other decisions of this Court, ERISA preempts any examination of the state law character of worker's compensation benefits. Finally, Oscar Mayer contended that even if Huppeler's analysis was followed, the offset is permitted since it is clear that the purpose of worker's compensation payments under Wisconsin law is to compensate for actual or presumed wage loss and not for bodily impairment.

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[2] In Losada, the Ninth Circuit held that a pension plan could offset only those worker's compensation awards in the nature of wage replacement, not awards for bodily impairment, and that state law must be examined to determine the character of each specific worker's compensation award. Id. at 1400-01.

The District Court granted summary judgment in favor of Oscar Mayer on October 27, 1993. It concluded that ERISA preempted Huppeler's reliance on the state law character of worker's compensation payments at issue. Pet. App. at 134-35. In reaching its conclusion, the District Court examined both the holding and the analysis of this Court's opinion in Alessi and concluded that the "broad holding in Alessi [is] that offsetting pension benefits by workers' compensation awards is not prohibited by ERISA." Resp. App. at A-8.[3] The District Court also premised its decision on the important federal principles involved in upholding the terms of a collective bargaining agreement and noted that Huppeler's worker's compensation payment would have been a permitted offset under the plans considered in Alessi. Pet. App. at 135.

Huppeler appealed the District Court's decision. In his briefs to the Seventh Circuit, Huppeler advanced what he referred to as the "correlation rule." While Oscar Mayer had consistently pointed out that Alessi's approval of pension plan offsets was based in part upon the Internal Revenue Service's conclusion that worker's compensation benefits "matched up" or "correlated" with benefits available under a qualified pension plan, Huppeler added his own twist to prior IRS rulings. Huppeler first claimed that under the "correlation rule" each element of a worker's compensation award must be examined individually to determine whether it matches up with benefits provided under a pension plan.[4] Secondly, Huppeler grafted on to prior IRS

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[3] The above-quoted language is one of the passages of the District Court's opinion which, for some reason, does not appear in Petitioners' Appendix.

[4] Throughout this case, Huppeler has repeatedly misquoted Rev. Rul. 78-178, 1978-1 C.B. 117, 118, as support for his view of the correlation rule. However, Huppeler fails to include all relevant portions of Rev. Rul. 78-178 anywhere in his Petition. Pet. at 5-6, 11. Had he done so, it would be obvious that Rev. Rul. 78-178 does not call for an examination of each element of a worker's compensation payment; rather Rev. Rul. 78-178 confirms that worker's compensation payments generally are matched up with benefits provided under a pension plan and, therefore, are available for offset:

(continued...)

rulings a requirement that state law be examined to discern the nature of the payment at issue.

The Seventh Circuit refused to accept Huppeler's so-called correlation rule. Pet. App. at 119. It affirmed the District Court, concluding that Alessi should be read as deferring to the IRS's interpretation of the nonforfeiture provisions in ERISA.[5] Pet. App. at 118-19. The Seventh Circuit refused to reconsider its decision when it denied Huppeler's request for a rehearing or rehearing en banc on October 5, 1994.

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[4] (...continued)

> There are many types of benefits under public programs that do not lend themselves to integration with private pension plan benefits. Thus a correlated retirement system could not exist. Only those programs which provide benefits that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist. For example, the benefits payable under State or Federal programs because of sickness and maternity, and which include cash benefits and medical services, may not be used as an offset to pension plan benefits because such benefits may not be provided under a qualified pension plan ....
>
> Revenue Ruling 68-243 allows the offsetting of pension plan benefits by the benefits payable under workmen's compensation laws and other occupational disease laws. These benefits are payable upon an employee's disablement. Section 1.401-1(b)(1)(i) of the regulations specifically allows the payment of pension plan benefits upon disability. Therefore, these programs may be used as an offset to plan benefits.

Rev. Rul. 78-178 (emphasis added).

[5] While the Seventh Circuit interpreted Alessi as deferring to IRS regulations rather than as a case interpreting Congressional intent, Oscar Mayer argued below and remains convinced that the offset at issue would be permitted under either analysis.

SUMMARY OF THE ARGUMENT

Huppeler's Petition for Writ of Certiorari should be denied because it does not raise an issue appropriate for the Court's exercise of its discretionary jurisdiction. Both lower court holdings are correctly decided and are consistent with this Court's earlier decision in Alessi and with the decisions of other federal courts that have considered this issue, except for the one aberrant holding by the Ninth Circuit. Moreover, the issues raised in this case do not rise to a level of national importance to justify this Court's review.

In Alessi this Court addressed the exact issue raised by Huppeler under an indistinguishable fact scenario. As such, one need not look beyond Alessi to conclude that the lower courts' decisions are correct.

ARGUMENT

I. THIS CASE IS NOT APPROPRIATE FOR THE COURT'S EXERCISE OF DISCRETIONARY JURISDICTION SINCE THE LOWER COURTS' DECISIONS ARE CONSISTENT WITH PRIOR SUPREME COURT PRECEDENT AND THOSE OF OTHER FEDERAL COURTS.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.1. There must be "special and important reasons" to grant review. Id. Among the reasons that the Court considers in exercising its discretion are:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of

> judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Id. (emphasis added). Contrary to Huppeler's assertion, the lower courts' decisions in this case do not conflict with this Court's prior decisions. Those decisions are also consistent with the decisions of all other federal courts except one aberrant decision.

A. The Lower Courts' Holdings in this Case Are Perfectly Consistent with this Court's Holding in Alessi.

In Alessi, Justice Marshall, speaking for a unanimous Court, held that pension plan offsets of worker's compensation payments do not contravene ERISA's forfeiture provisions. 451 U.S. at 526. The result reached by the lower courts in this case -- that Oscar Mayer may offset Huppeler's worker's compensation benefits -- is squarely premised on and is identical to the result reached by this Court in Alessi.

Huppeler asserts that because the Seventh Circuit notes some ambiguity in Alessi's reasoning (but not its holding), its decision somehow conflicts with this Court's prior holding. Huppeler Pet. at 18.[6] However, this Court has indicated time and again that it "reviews

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[6] In order to manufacture this conflict, Huppeler focuses on a statement made in a footnote in the Solicitor General's amicus brief in Alessi.

(continued...)

judgments, not statements in opinions." Black v. Cutter Lab., 351 U.S. 292, 297 (1956); see also Bowen v. American Hosp. Ass'n, 476 U.S. 610, 625 n.11 (1986); Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842 (1984). It is, therefore, the Seventh Circuit's ultimate judgment which is at issue here -- a judgment which upholds Oscar Mayer's offset of worker's compensation payments just as such offsets were upheld by this Court fourteen years ago in Alessi.

Both this case and Alessi arose from identical fact patterns and indistinguishable pension plan offset provisions. In both cases, retirees were receiving pension benefits from plans, the terms of which were negotiated between their employers and unions representing the retirees. In both cases the plans involved applied offset provisions which contained identical exceptions for loss of a body member. In both cases, a retiree's pension benefits were reduced, on a dollar-for-dollar basis, after receipt of worker's compensation payments. Alessi, 451 U.S. at 507-08 n.1 & 2. As noted by the District Court below, had Huppeler's worker's compensation payment been at issue in Alessi, such payment would have been an allowable offset under the plan approved by the Supreme Court in that case. Pet. App. at 135. Most important, in neither case did the court find it necessary to examine each element of the worker's compensation payment under state law before approving the offset. Alessi, 451 U.S. at 520 n.16.

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[6] (...continued)
This footnote incorrectly summarizes Rev. Rul. 78-178, discussed supra at note 3. Huppeler's entire case is premised on this footnote, which was later incorrectly applied by the Ninth Circuit in Losada. Neither the text of Alessi nor any of the IRS rulings cited by Huppeler indicate that each worker's compensation payment should be independently examined to determine whether it matches up with benefits that may be provided under a qualified pension plan. Rather, all these rulings speak in terms of worker's compensation payments generally, and conclude that offset of such payments is permissible. See Rev. Rul. 78-178; see also Rev. Rul. 69-421, Part 4(j)(4), 1969-2 C.B. 59, 72. Moreover, it should be noted that while Huppeler's arguments focus on Internal Revenue Code regulations and rulings, this case is one brought under ERISA, an entirely distinct federal statute.

Since this case presents no conflict with prior Supreme Court precedent, it is not an appropriate case for this Court's exercise of its discretionary jurisdiction.

B. The Issue of Worker's Compensation Offsets Is Not One Involving Substantial Conflict among the Federal Courts; Rather it Is a Situation in which all Federal Courts but One Are in Substantial Agreement.

Huppeler asserts that the Seventh Circuit's decision in this case is in direct conflict with that of "numerous" courts of appeals. Huppeler Pet. at 17. In support of this assertion, Huppeler completely misrepresents the Second Circuit's holding in Reska v. Pension Plan, 848 F.2d 372 (2d Cir. 1988), and paints a picture of conflict and confusion among the federal courts which simply does not exist.[7] To the contrary, published federal court holdings are unanimous on this issue except for the aberrant decision of the Ninth Circuit.

Since the Supreme Court decided Alessi in 1981, the issue of worker's compensation offsets has been considered by the Second, Fourth, Sixth, Seventh and Ninth Circuit Courts of Appeals, and several district courts. All except the Ninth Circuit have upheld the offset of worker's compensation payments. PPG Indus. Pension Plan A (CIO) v. Crews, 902 F.2d 1148 (4th Cir. 1990) (pension plan offset of permanent total disability worker's compensation awards

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[7] Huppeler asserts that the Second Circuit's opinion in Reska is in accord with the Ninth Circuit's opinion in Losada. Huppeler Pet. at 19. However, as pointed out by the District Court below, Pet. App. at 132, the Second Circuit decision in Reska is consistent with the holdings of the Fourth and Sixth Circuits and completely contrary to that in Losada. In Reska, the Second Circuit acknowledges that Alessi permits pension integration with a worker's compensation awards such as that for the partial hearing loss provided to the retiree in that case. Reska, 848 F.2d at 374. Moreover, the Court noted that it need not even reach the question of Alessi's interpretation since the plaintiff failed to establish any state law support for his allegations. Id. at 375. The situation presented in the instant case is identical to that in Reska.

affirmed without examining character of awards); Reska, 848 F.2d 372 (pension plan offset of worker's compensation payment for partial hearing loss is upheld as consistent with Alessi; affirming district court that expressly rejected Losada analysis as contrary to the Supreme Court's holding in Alessi); Kapuscinski v. Plan Adm'r, 658 F.2d 427 (6th Cir. 1981) (ERISA allows deduction of any worker's compensation benefits from retiree's pension); Kopko v. Raymark Indus., Inc., No. B-88-98, 1990 U.S. Dist. LEXIS 13168 (D. Conn. September 4, 1990) (without examining state law, court holds that retirement plan may offset lump sum worker's compensation benefits); Salyers v. Allied Corp., 642 F. Supp. 442 (E.D. Ky. 1986) (offset of disability pension benefits by worker's compensation benefits approved without examination of character of benefits); Martin v. McCarthy, 520 F. Supp. 783 (D. Mass. 1981) (pension plan may offset amount of lump sum worker's compensation benefits).

In sum, only the Ninth Circuit diverges from the decisions reached by the federal courts that have considered the issue of worker's compensation offsets. If this creates a conflict in need of resolution, a better vehicle would be a subsequent case from the Ninth Circuit, rather than the correctly decided decision of the Seventh Circuit.[8]

II. THE ISSUES ADDRESSED IN THIS CASE DO NOT RISE TO A SUFFICIENT LEVEL OF IMPORTANCE TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION, PARTICULARLY SINCE THIS EXACT ISSUE HAS BEEN PREVIOUSLY ADDRESSED AND DECIDED BY THIS COURT.

Rule 10.1(c) of the Supreme Court indicates that one of the considerations involved in determining whether certiorari should be

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[8] In light of the Ninth Circuit's recent decisions regarding the broad preemptive reach of ERISA, it is possible that Losada would be decided by that court differently if brought today. See Serrato v. John Hancock Life Ins. Co., 31 F.3d 882 (9th Cir. 1994) (adhering to ERISA's broad preemptive reach that implements Congress's goal of uniform pension plan regulation).

granted is "[w]hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10.1(c) (emphasis added). The worker's compensation offset at issue in this case has already been settled by this Court and does not rise to a level of national importance justifying reconsideration.

A. This Case Does Not Present Any Issues Not Previously Settled by This Court.

The facts in this case are identical in all material respects to those present in Alessi. Before reaching its decision in Alessi, this Court exhaustively examined the legislative history behind the adoption of ERISA and recognized that ERISA reflected a Congressional balance between two often competing goals -- the need to enact necessary rules and restrictions on private pension plans and the corresponding need to keep employer costs within reasonable limits. Alessi, 451 U.S. at 514-16. In discussing integration with the Social Security program, the Court noted the House Ways and Means Committee's deliberation over ERISA's competing goals:

> [Y]our committee is very much aware that many present plans are fully or partly integrated [with the social security program] and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans.

Alessi, 451 U.S. at 415 (quoting H.R. Rep. 93-807, 93rd Cong., 2d Sess., 69 (1974), II Leg. Hist. 3115, 3189).

After examining the intent of Congress when it enacted ERISA, this Court unanimously determined that worker's

compensation offsets were permitted. There is no reason to examine this issue again.

Huppeler also argues that there is an "unsettled" issue of whether the character of worker's compensation awards should be determined as a matter of federal common law or with reference to applicable state worker's compensation law. Of course, this "issue" is only relevant if this Court first decides to overrule Alessi. For the reasons stated elsewhere in this brief, there is no reason to do so.

Moreover, although this Court has not expressly addressed the issue of state versus federal law as applied to the character of worker's compensation payments for offset purposes, this Court's prior decisions have consistently recognized ERISA's broad preemption of state law. FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) ("The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA.") (alteration in original); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (ERISA's preemption provisions are "deliberately expansive" and intended to give federal authorities "sole power to regulate the field of employee benefit plans"); Alessi, 451 U.S. at 523 (ERISA is designed to "establish pension plan regulation as exclusively a federal concern").

If the character of the worker's compensation payment impacts upon the operation of a pension plan under ERISA, this Court's prior decisions make it clear that ERISA's expansive preemptive reach would necessitate determination of the character of worker's compensation under federal law. Therefore, neither question presented in Huppeler's Petition involves an issue that has not already been addressed by this Court in its prior rulings.

B. The Questions Presented in Huppeler's Petition Are Not of National Importance and Do Not Have a Significant Impact on the Operation of Most Retirement Plans.

Huppeler also asserts that this Court's resolution of the worker's compensation offset issue will impact many thousands of employees who suffer permanent work-related injuries every year. Huppeler Pet. at 24. Huppeler provides absolutely no support for this bald assertion, and there is no record evidence of how many retired employees covered by plans with a worker's compensation offset have been subject to such an offset.

In fact, worker's compensation offsets like the one at issue here exist only in qualified retirement plans known as defined benefit pension plans. Changes in the nature of the American workforce, and the increasing regulation of defined benefit plans (resulting in additional expense and complexity), have resulted in a significant decrease in the number of defined benefit plans as a percentage of the total number of plans and a significant decrease in the number of active plan participants covered by defined benefit plans as a percentage of all active plan participants.[9] The decrease in defined benefit plans is coupled with a corresponding increase in employer-sponsored defined contribution plans which, by their nature, do not include worker's compensation offsets such as those at issue in this case.

Moreover, those employees who are covered by defined benefit plans under negotiated agreements can avoid inclusion of worker's compensation offset provisions in the plan through the collective bargaining process, if they so desire. The worker's compensation offset in the case at hand was expressly negotiated

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[9] See Pension and Welfare Benefits Administration, U.S. Dep't of Labor, Abstract of 1991 Form 5500 Annual Reports, Private Pension Plan Bulletin, Winter 1994, at Number 4, Tables E-1 and E-8; Celia Silverman, Changes in DB and DC Plans Occurring Mainly Among Small Plans, EBRI Notes 1-3, (March 1994); see also Steven E. Schanes, Sad Demise Of The Defined Benefit Plan, Pension World 4 (December 1993).

between Oscar Mayer and the union representing Huppeler. Union members, including Huppeler, most assuredly received consideration in exchange for the inclusion of the worker's compensation offset and should not now be heard to decry the results of their negotiated bargain.

C. To the Extent That Huppeler's Position is Correct, the Internal Revenue Service Will Address These Offsets; Therefore, the Supreme Court Need Not Review this Issue.

Huppeler's position from the inception of this litigation has been that the worker's compensation offset at issue does not comply with Internal Revenue Service rulings (as such rulings are interpreted by Huppeler) and, therefore, it violates ERISA. The unstated assumption in Huppeler's argument is that the Internal Revenue Code rules for determining whether a plan is tax qualified are coterminous with the vesting rules under ERISA. If that assumption is accurate (a proposition which Oscar Mayer disputes), it provides another reason for this Court to deny Huppeler's Petition. If a violation of the IRS's qualified plan rulings has occurred, as Huppeler alleges, then the IRS has the authority and ability to address this violation, and this Court need not take it upon itself independently to examine this issue.

The IRS has an established system for individually identifying and ruling upon specific plan language and operational compliance with IRS requirements.[10] If the IRS believed that Oscar Mayer's

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[10] Pursuant to 26 C.F.R. § 601.201, the IRS issues advance determinations with respect to a plan's compliance with IRS requirements for favorable tax treatment, including compliance with the IRS vesting requirements. In addition, if during a plan's ongoing operation, the IRS determines that the plan is not complying with IRS requirements, the IRS is empowered to disqualify the plan. The IRS is not reluctant to disqualify a plan when a violation occurs. See, e.g., Wisconsin Nipple & Fabricating Corp. v. Commissioner, 581 F.2d 1235 (7th Cir. 1978) (disqualification of plan for failure to satisfy Code Section 401(a)); Basch Eng'g, Inc. v. Commissioner, 59 T.C.M. (CCH) 482 (T.C. 1990) (disqualification for failure to timely amend

(continued...)

Pension Plan was not complying with IRS vesting requirements in either form or operation, the IRS has the means available and would have taken steps to disqualify the Plan. Yet Huppeler has never alleged that the IRS has taken any action against Oscar Mayer.

As the Supreme Court notes in Alessi, tax qualified plans are subject to IRS regulation. 451 U.S. at 521 n.17. If Huppeler's analysis regarding IRS rulings is correct, the IRS will deal with Oscar Mayer's Pension Plan and any others like it. There is no need for this Court to address Oscar Mayer's offset under ERISA.

III. THE RESULT REACHED BY THE SEVENTH CIRCUIT IN THIS CASE WAS THE CORRECT ONE.

Although the correctness of the result reached in the lower courts is not expressly described as a factor taken into consideration in granting certiorari under the Supreme Court rules, it has been considered relevant to the Court's determination of whether or not to grant certiorari in the past. As indicated by Justice Stevens, "[t]he Court seldom takes a case merely to reaffirm settled law." Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), see also Robert L. Stern et al., Supreme Court Practice 193-95 (7th ed. 1993).

As demonstrated above, a grant of certiorari in this case would merely affirm a decision that is in accord with settled law. Therefore, to the extent that this Court deems the issues involved significant enough to warrant review, it is respectfully suggested that the more appropriate vehicle for such review would be a subsequent decision from the Ninth Circuit, which is the only Court of Appeals to have deviated from this Court's prior precedent.

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[10] (...continued)
plan); Buzzetta Constr. Corp. v. Commissioner, 92 T.C. 641 (T.C. 1989) (disqualification for failure to comply with requirements of Code Section 415).

CONCLUSION

This case presents no question of sufficient importance to justify the Court's review. Nor do the lower courts' holdings conflict with prior decisions of this Court or the vast majority of federal courts which have addressed this issue. Rather, this case involves simply the application of this Court's prior decision in Alessi to facts that are materially indistinguishable from those addressed by this Court fourteen years ago. Therefore, Oscar Mayer respectfully requests that the Court deny Huppeler's petition for writ of certiorari.

Respectfully submitted this 2nd day of February, 1995.

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RESPONDENTS' APPENDIX

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1. Huppeler v. Oscar Mayer Foods Corp., No. 93-C-370-S, Memorandum and Order (W.D. Wis. Oct. 27, 1993) A-1

2. Sections 203(c) and 514 Employment Retirement Income Security Act ("ERISA") A-12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT ALLAN HUPPELER,
EDWIN C. MAGLI and
ELLWOOD SANDMIRE,
Plaintiffs,

v.

MEMORANDUM AND ORDER
93-C-370-S

OSCAR MAYER FOODS CORP.,
Defendant.

Plaintiffs Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire commenced this action against defendant Oscar Mayer Foods Corp. ("Oscar Mayer") for declaratory relief, determining that the offset of pension benefits by workers' compensation benefits for partial hearing loss are improper forfeitures prohibited by 29 U.S.C. §1053(a).

Jurisdiction exists pursuant to 28 U.S.C. §1332.

The action is before this court on five motions. Defendant Oscar Mayer moves the court to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted, for failure to exhaust administrative remedies and for failure to name the proper party defendant. Plaintiffs move for summary judgment in their favor, declaring that offsets of pension benefits by the type of workers' compensation benefits at issue are illegal forfeitures pursuant to 29 U.S.C. §1053. Finally, Oscar Mayer moves for summary judgment, determining that its practice to offset pension benefits by workers' compensation benefits is not prohibited by ERISA.

FACTS

Oscar Mayer employed plaintiffs Huppeler, Magli and Sandmire at its plant in Madison, Wisconsin. While employed all

three plaintiffs were members of Local 538 of United Food and Commercial Workers International Union ("Union"). As members of the Union they were covered by Pension Plan 1 ("Pension Plan") sponsored by Oscar Mayer and negotiated between Oscar Mayer and the Union. Oscar Mayer is the administrator of said Plan which provides benefits for normal retirement, early retirement and disability retirement. Pursuant to the terms of a 1985 negotiated agreement between the Union and Oscar Mayer a retiree's benefits paid from the Pension Plan are offset on a dollar-for-dollar basis by workers's compensation payments except for "ioss of a body member."

Huppeler and Sandmire are subject to the 1985 agreement which includes a provision for workers' compensation offsets because they retired after 1985. Sandmire disputes that he is subject to said agreement. All three plaintiffs have received early retirement or retirement benefits from Oscar Mayer and have not received disability benefits. All three plaintiffs allege they have suffered work related permanent hearing loss. Only Huppeler has filed and received workers' compensation benefits for loss of hearing which he filed and received after he retired.

The Department of Industry, Labor & Human Relations (DILHR)'s Worker's Compensation Division awarded Huppeler an award of 45.58 weeks of payments at a rate of $144 per week in a lump sum payment of $6,563.62 based on Huppeler's wage rate while at Oscar Mayer as a result of his 21.1 percent permanent partial bilateral hearing handicap. The Labor & Industry Review Commission (LIRC) affirmed DILHR and the award of workers' compensation benefits on February 26, 1993. On May 14, 1993 Huppeler received a letter from Oscar Mayer's Employee Benefits Manager where he was advised that his retirement benefits pursuant to the Pension Plan would be offset dollar for dollar with the amount received in workers' compensation. He was not advised of a claims or review procedure, although said procedures applicable to the Pension Plan are contained in the Pension Plan Summary Plan Description provided to Plan participants. Huppeler never filed a claim pursuant to the internal claims procedure. All three plaintiffs disclaim any knowledge of an internal claims or review procedure. Huppeler has not sought or obtained paid employment since retirement.

Sandmire and the medical professionals he has consulted believe he has suffered a work related hearing impairment. He contacted an attorney to discuss filing a workers' compensation claim concerning his hearing loss and was advised not to file because any benefits would be offset against his pension benefits and after lawyers fees he would actually lose money.

Magli believes he has suffered a permanent hearing loss which is work related and has refrained from filing a workers' compensation claim because he believes the benefits would be offset against his pension benefits.

MEMORANDUM

The motions before this Court have raised five issues to be decided.

Exhaustion

Defendant Oscar Mayer moves to dismiss plaintiffs' complaint alleging that defendant Huppeler has failed to exhaust his administrative remedies. Plaintiff states he was not aware of any internal claims or review procedures and notes that the letter from Oscar Mayer informing him of the offset of his pension benefits did not reference any review procedure by which he could challenge Oscar Mayer's decision. Oscar Mayer argues that Huppeler did not utilize the claims procedure described in the Summary Plan Description which is provided to all pension plan participants.

In the absence of a statutory mandate it is within the sound discretion of the trial court to determine whether exhaustion of administrative remedies will be required for a claim brought pursuant to ERISA. The district court's decision will be reversed only for an abuse of discretion. Janowski v. Int'l. Broth. of Teamsters, Inc., 673 F.2d 931, 935 (7th Cir. 1982), cert. den. 459 U.S. 858 (1982), vac. on other grounds 463 U.S. 1222 (1983); Powell v. A.T.& T. Communications, Inc., 938 F.2d 823, 825 (7th Cir. 1991). Exhaustion "is only appropriate where it is necessary to develop a full factual record or to take advantage of agency expertise." Janowski, 673 F.2d at 935. Where the issue is merely a question of statutory

interpretation, exhaustion is not required. Id. at 935. Exhaustion of administrative procedures is also not required where the administrative procedure would be futile or would be a useless gesture. See Powell v. A.T.& T. Communications, Inc., 938 F.2d 823, 826 (7th Cir. 1991); Carter v. Signode Industries, Inc., 688 F.Supp. 1283 (N.D. IL. 1988).

Dismissing this case to require exhaustion of administrative procedures would not be efficient, would not serve justice, and would likely prove futile. Defendant Oscar Mayer, plan administrator, asserts that controlling Supreme Court precedent governs the dispute. There is no doubt that the pending motions concern only a question of law, the correct interpretation of Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). Indeed, defendant has filed a motion for summary judgment alleging there are no disputes of material fact. Requiring plaintiff Huppeler to argue his competing interpretation of Alessi to Oscar Mayer within the context of Oscar Mayer's administrative procedure would be wasteful and to no avail.

Moreover, Oscar Mayer cannot be heard to complain that the administrative procedures were not utilized where it did not inform Huppeler of its review procedures in the letter to him when informed that his pension benefits would be offset by the workers's compensation award.

Proper Party Defendant

Defendant has moved the Court to dismiss this action for failure to name a proper party defendant. Plaintiffs have amended their complaint to name as defendants the Pension Plan and Oscar Mayer as Plan Administrator. Oscar Mayer now concedes that it is a proper party defendant.

Magli and Sandmire as proper parties

Oscar Mayer also asserts that plaintiffs Magli and Sandmire are not proper parties to the action because they have neither suffered offsets of pension benefits, nor received workers' compensation awards for hearing loss and as such they do not have a "controversy" sufficient to join as parties to this declaratory judgment action.

A district court is without power to grant declaratory relief unless an "actual controversy" within the meaning of the Declaratory Judgment Act, 28 U.S.C. §400 exists. Maryland Casualty Co. v. Pacific Coal & Co., 312 U.S. 270, 272 (1941). The difference between an abstract question and a "controversy" is necessarily one of degree. Id. at 273.

> Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Id.

Plaintiffs Magli and Sandmire have stated in affidavits that they have suffered hearing loss and have not filed workers' compensation claims because of Oscar Mayer's policy which offsets pension benefits by workers' compensation awards. The injury, hearing loss, is not dependent on any factors; it has already occurred. The legal interests are sufficiently adverse; Oscar Mayer wants to continue to offset pension benefits with workers' compensation awards and plaintiffs Magli and Sandmire want Oscar Mayer's offset policy to be declared illegal so they may file for workers' compensation benefits without a resulting offset.

Motion to dismiss or summary judgment

Oscar Mayer asserts that this case should be dismissed for failure to state a claim upon which relief can be granted because the allegations in the complaint do not state a claim for relief. Plaintiffs argue that summary judgment is proper because factual evidence other than the assertions contained in the complaint are required for a proper disposition of the case. Plaintiffs Magli and Sandmire joined Huppeler's motion for summary judgment.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, if on a motion for dismissal for failure to state a claim, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed.

R. Civ. P. 12(b)(6). The court has relied on matters outside the pleadings, and this action will be treated as one for summary judgment.

Merits

Plaintiffs assert that offsetting pension benefits by workers' compensation benefits awarded for permanent hearing impairment violates 29 U.S.C. §1053(a), the nonforfeiture provision of the Employee Retirement Income Security Act of 1974 (ERISA). Oscar Mayer asserts that Alessi, the controlling Supreme Court precedent, sanctions the offset of pension benefits by all workers' compensation awards without regard to the character of said award.

Plaintiffs and defendant dispute the interpretation of Alessi as have the Ninth, Fourth and Sixth Circuits. Plaintiffs essentially argue that Alessi holds that pension benefits may be offset by workers' compensation benefits which have the character of wage replacement, but those benefits which provide "fixed sums for bodily impairment" are not subject to integration. Defendant interprets Alessi as holding pension benefits may be offset by any workers' compensation benefits regardless of their character. Because plaintiffs argue that workers' compensation awards for permanent partial hearing loss fit under the rubric, "fixed sum for bodily impairment," it is necessary to decide which of the competing interpretations is correct.

The Court held that in the enactment of ERISA Congress contemplated and approved the kind of pension provisions challenged in Alessi which permits offsets of pension benefits based on workers' compensation awards. Id. at 526. The Court also held that the New Jersey law that prohibited the integration of pension benefits with workers' compensation was preempted by ERISA pursuant to 29 U.S.C. § 1144(a). Id. at 522. The Court found that ERISA was an area of exclusive federal concern and noted that since ERISA leaves integration of pension plans subject to the discretion of pension plan advisors, which in this instance are the products of collective bargaining agreements, there is an additional federal interest in precluding state interference with labor-management negotiations. Id. at 524-525.

The Alessi plaintiffs were retired employees whose pension benefits were offset by their workers' compensation awards pursuant to a provision in their pension plan resulting from collective bargaining that required such offsets. Id. at 507-508.

The Court in Alessi made the broad assertion that pension benefits may be offset by workers' compensation awards. It did not, however, examine the character of the workers' compensation awards. This may suggest that the character of the workers' compensation award is not an issue, especially where the class of plaintiffs was so large. However, the Alessi Court did not explicitly state that pension benefits may be offset by all workers' compensation awards, regardless of their character.

The Court discussed IRS rulings on pension plan integration which it held were embraced by Congress when enacting ERISA. See Alessi, 451 U.S. at 519-521. After stating that the IRS has allowed offsets for workers' compensation benefits the Court then notes that funds received for "bodily impairment" or as reimbursement for medical expenses may not be used to offset pension benefits. The Court cites to Revenue Ruling 78-178 as authority for this proposition, see Id. at 520-521, which does not state that workers' compensation awards for "bodily impairment" may not be used to offset pension benefits. It does provide, however, that awards for sickness and maternity may not be used as offsets because these benefits do not correspond to benefits allowed under a qualified ERISA pension plan. Rev. Rul. 78-178, 1978-1 Cum. Bull. 117. In contrast, Revenue Ruling 78-178 also states that workers' compensation awards may be used to offset pension plan benefits for they correlate with the benefits which may be provided under an ERISA qualified pension plan because workers' compensation awards are provided upon disablement and ERISA allows for pension plans to pay benefits upon disablement. Id.

Any ambiguity is intensified in Alessi when the Court notes that sums received for "bodily impairment" may not be used to offset pension benefits and that the pension plan covering General Motors' employees "avoids any ambiguity on this point" because it provides for the offset of pension benefits by all workers' compensation awards, but not workers' compensation awards for medical expenses, fixed

statutory payments for the loss of any bodily member or 100% loss of use of any bodily member, or payments for the loss of industrial vision. See Alessi, 451 U.S. at 521 n. 17; 451 U.S. at 507-508 n. 1. The Court goes on to state that Raybestos does not have a similar limitation in its clause providing for the offset of pension benefits by workers' compensation but states that this clause "is of course subject to IRS regulation". Id. at 521 n. 17.

We accordingly are left with a broad holding in Alessi that offsetting pension benefits by workers' compensation awards is not prohibited by ERISA. It may not be clear whether workers' compensation awards for "bodily impairment" may be offset against pension benefits, although the Alessi Court, given a broad group of plaintiffs, did not examine the character of the awards. Alessi does not contain a definition of "bodily impairment." At a minimum, however, it must mean loss of a body member or loss of 100% use thereof or loss of industrial vision. See id.

The Ninth Circuit has interpreted Alessi other than have the Second, Fourth, and Sixth Circuits. The Ninth Circuit in Losada v. Golden Gate Disposal Co., 950 F.2d 1395 (1991) interpreted Alessi as holding that only workers' compensation awards in the nature of wage replacement may be used to offset pension benefits and that workers' compensation awards in the nature of bodily impairment may not be offset against pension benefits, id. at 1400. The Ninth Circuit held that state law must be examined to determine the character of the workers' compensation award, id. at 1400-1401, and reasoned that since the workers' compensation award occurred after retirement, any lost wages would have been negligible, thus the award was for bodily impairment and not subject to an offset. Id. at 1400.

In contrast, the Fourth Circuit in PPG Industries v. Crew, 902 F.2d 1148 (1990) held that under Alessi offsets of pension benefits by a workers' compensation award for a permanent total disability were valid. The plaintiffs in PPG suffered from permanent dust pneumonia and the workers' compensation claims were filed approximately eleven years after retirement. The award covered the period of time from retirement to the date of the award. The Court did not discuss the character of the workers' compensation award under state law. Id. at 1149.

Similarly in Kapuscinski v. Plan Administrator, 658 F.2d 427 (1981) the Sixth Circuit held that the offset of pension benefits by workers' compensation awards was valid under Alessi's interpretation of ERISA. The Court made no distinction between the types of workers' compensation awards. The opinion did not contain a discussion of why plaintiff received workers' compensation and the fact that the plaintiff filed for workers' compensation after he retired did not influence the Sixth Circuit's analysis.

Finally, in Reska v. Pension Plan, 848 F.2d 372 (1988), the Second Circuit faced facts almost exactly as here. Plaintiff received a workers' compensation award for a twenty percent hearing loss, id. at 373, asserting said hearing loss was "bodily impairment" and could not be subject to an offset under Alessi. Id. at 374. The Court refused to decide whether Alessi or relevant IRS rulings apply to all or only some workers' compensation awards. Id. at 375. The Second Circuit stated "[e]ven assuming arguendo, that Alessi only applies to workers' compensation awards 'in the nature of wage replacement,' appellant has failed to demonstrate that his award for partial hearing loss was not provided for wage replacement." Id. The Court then examined state law and determined that in New York even scheduled awards were intended to compensate for loss of presumed earning power and the offset was proper. Id.

Plaintiffs Huppeler, Magli, and Sandmire assert that awards for permanent partial hearing loss are awards for "bodily impairment" under Wisconsin case law, that awards received after retirement are not in the nature of wage replacement and are accordingly awards for "bodily impairment."

Given the broad preemption of state law by ERISA in the field of pension plans state law is not examined. The Supreme Court in Alessi noted that ERISA contains an explicit congressional statement concerning the preemptive effect of ERISA:

> [T]he provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.

Alessi, 451 U.S. at 522 quoting 29 U.S.C. §1144(a). The Court stated that this provision was "meant to establish pension plan regulation as exclusively a federal concern." Id. at 523. Moreover, nowhere in the entire opinion did the Court in Alessi discuss the character of workers' compensation awards under state law. Given the strong federal interest in the uniform enforcement of ERISA, this court declines to engage in a practice that would lead to different rulings in different circuits on whether all workers' compensation awards may be used to offset pension benefits based on the varying character of the workers' compensation awards under state law. Under Alessi state laws which prohibit offsets of pension benefits by workers' compensation are preempted. This Court will not accept a practice whereby a state may provide its workers' compensation awards for bodily impairment, thereby avoiding preemption by ERISA and reversing the IRS and Supreme Court practice of sanctioning pension plan integration of workers' compensation awards.

There is another important federal interest here at risk. There is a reluctance to interfere with the relationship between labor and management by changing an agreement in which defendant Oscar Mayer and the Union negotiated an offset provision. See id. at 525. The agreement provided for the offset of pension benefits by workers' compensation awards, except awards for "loss of a body member." Had defendant and the Union intended to exempt compensation awards for partial hearing loss from pension benefits, they would have done so clearly. This Court refuses to rewrite the labor agreement.

Further, the offset of workers' compensation awards for partial hearing loss would not have violated the agreement approved by the Court in Alessi. An award for hearing loss would have been subject to an offset under the agreement in Alessi because hearing loss would not have been included under the rubric of loss of a body member.

Accordingly, the offset of pension benefits by workers' compensation awards for partial loss of hearing does not violate ERISA.

ORDER

IT IS ORDERED that the motion of defendant Oscar Mayer to dismiss for failure to exhaust administrative procedures is DENIED.

IT IS FURTHER ORDERED that motion of defendant Oscar Mayer to dismiss for failure to name a proper party defendant is DENIED.

IT IS FURTHER ORDERED that motion of defendant Oscar Mayer to dismiss for failure to state a claim upon which relief can be granted is DENIED.

IT IS FURTHER ORDERED that motion of plaintiffs Huppeler, Magli and Sandmire for summary judgment is DENIED.

IT IS FURTHER ORDERED that motion of defendant Oscar Mayer for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant Oscar Mayer Foods Corp. against the plaintiffs Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire DISMISSING plaintiffs' complaint and all claims contained therein with prejudice and costs.

Entered this 27th day of October, 1993.

BY THE COURT:

_____

JOHN C. SHABAZ
District Judge

Employee Retirement Income Security Act ("ERISA")

ERISA § 203. Minimum vesting standards

(a) **Nonforfeitability requirements.** Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

(C) A plan satisfies the requirements of this subparagraph if --

(i) the plan is a multiemployer plan (within the meaning of section 3(37)), and

(ii) under the plan --

(I) an employee who is covered pursuant to a collective bargaining agreement described in section 3(37)(A)(ii) and who has completed at least 10 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions, and

(II) the requirements of subparagraph (A) or (B) are met with respect to employees not described in subclause (I).

(3) (A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 205 [29 USCS § 1055]).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits --

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(c)(8) [29 USCS § 1082(c)(8)].

(D) (i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 204(c)(2)(C) [29 USCS § 1054(c)(2)(C)]) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored

upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 204(c)(2)(C) [29 USCS § 1054(c)(2)(c)] (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before the date of the enactment of this Act [enacted Sept. 2, 1974], a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before the date of the enactment of this Act [enacted Sept. 2, 1974] if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after the date of the

enactment of this Act [enacted Sept. 2, 1974]. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference. For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 206(c)[29 USCS §1056(c)].

(E) (i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because--

(I) the plan is amended to reduce benefits under section 4244A or 4281 [29 USCS §§ 1425 or 1441], or

(II) benefit payments under the plan may be suspended under section 4245 or 4281 [29 USCS §§ 1426 or 1441].

(F) A matching contribution (within the meaning of section 401(m) of the Internal Revenue Code of 1986) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of such Code [Code Sec. 401(k)(8)(B)], an excess deferral under section 402(g)(2)(A) of such Code [Code Sec. 402(g)(2)(A)], or an excess aggregate contributions under section 401(m)(6)(B) of such Code [Code Sec. 401(m)(6)(B)].

ERISA § 514. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.